COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2015-SC-000555

ON APPEAL FROM COURT OF APPEALS CASE NO. 2013-CA-0001677-MR
HOPKINS CIRUCIT COURT, HON. JAMES C. BRANTLEY
CIVIL ACTION NO. 11-CI-00387

KATHY McABEE — **APPELLANT**

v.

DARREN C. CHAPMAN, M.D. — **APPELLEE**

REPLY BRIEF FOR APPELLANT

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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 2015, true and correct copies of the foregoing BRIEF FOR APPELLANT were served via U.S. Mail, Postage Prepaid, upon the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. James C. Brantley, Judge, Hopkins Circuit Court, Justice Center, 120 E. Center Street, Box 1, Madisonville, KY 42431; and Charles G. Franklin, Esq. FRANKLIN, GORDON, & HOBGOOD, 24 Court Street, P.O. Box 547, Madisonville, KY 42431. I FURTHER CERTIFY that the Record of Appeal was not checked out from the Clerk of the Kentucky Supreme Court prior to the filing of this brief.

By: _____
Charles S. Wible

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF THIS REPLY BRIEF

Rather than repeat all of the arguments made previously, the purpose of this brief is to respond to arguments made by Appellee. Failure to respond to a particular argument should not be considered a waiver of that argument.

ARGUMENT

I. THIS COURT'S DECISION IN SPEARS IS APPLICABLE TO THIS CASE

Appellee wishes this Court to limit or disregard this Court's recent decision in Spears v. Commonwealth, 448 S.W. 3d 781 (Ky. 2014). This is understandable, as Spears repudiates the analysis of the Circuit Court and the Court of Appeals. However, Spears should apply to this case and Appellee's attempts to distinguish this case from Spears are disingenuous.

A. Kentucky Law Allows the Application of Spears Retroactively

Appellee complains that because the trial in this case was concluded before Spears was decided and that the analysis in Spears had not been set out prior to trial or the Court of Appeals decision in this case, it would be unfair for Spears to be applied to this case. Appellee's complaints are without merit as Spears was decided during the pendency of the appeal in this case.

A party can receive the benefit of a new interpretation of the Kentucky Rules of Evidence when that party's case is on direct appeal. Hoff v. Commonwealth, 394 S.W. 3d 368, 373 (Ky. 2011). Moreover, the short period of time that elapsed between the verdict in this case, and the decision in Spears is of no moment; a new interpretation can benefit a party years after that interpretation is issued if that case was on direct appeal. Hoff, 394 S.W. 3d at 373 (citing Alford v. Commonwealth 338 S.W. 3d 240, 247-8 (Ky. 2011)). Spears was decided while Appellant's

motion for discretionary review was pending. Thus, Appellee cannot claim that he is immune from Spears.

B. Even if Spears Should Not Be Applied Retroactively, It Remains Persuasive Authority to Address the Court of Appeals Analysis

Even if this Court does not wish to apply Spears as controlling, it remains extremely persuasive in how this Court should decide the instant case. First, Spears was a ruling by this very Court, and it axiomatic that this Court should find its own analysis persuasive. Secondly, Spears goes to the very heart of the issue in this case; whether KRE 615(3) grants an automatic exemption to expert witnesses and what kind of showing is necessary to show that an expert is "essential" to be allowed to remain in the courtroom.

Finally, it should not be forgotten that the Court of Appeals decision in this case was originally designated "to be published." See App. A. While the Court of Appeals opinion became unpublished under CR 76.28(4)(a) upon Appellant filing her Motion for Discretionary Review, the Court of Appeals opinion would have been controlling authority throughout the Commonwealth absent this appeal. Thus trial courts across Kentucky would be applying the incorrect Court of Appeals analysis. That this Court came to the opposite conclusion of the Court of Appeals in a "to be published" case of its own is strongly persuasive that the Court of Appeals applied the wrong law and its decision should be reversed.

C. The Analysis in Spears is Not Distinguishable From This Case

Appellee attempts to distinguish the instant case from Spears in three ways: that Spears was a criminal case; that defense counsel in Spears attempted to utilize its expert as an "elbow expert," and finally that the trial court in Spears denied allowing the defense expert to remain due to the expert not being present when other witnesses testify. All of these attempts are disingenuous.

First, there is nothing in Spears to indicate that this Court only meant Spears to apply to criminal cases. Furthermore, Appellee cites to numerous criminal cases in support of his position. Secondly, that defense counsel in Spears wanted an "elbow expert" or that the expert in Spears did not listen to the testimony of other witnesses completely misses the point and is merely an attempt to deflect this Court from what truly matters; how the arguments in Spears mirrors the arguments put forth by Appellee and the Court of Appeals in this case.

In Spears, the Court summed up (and rejected) the arguments of defense counsel thusly:

> Instead, Appellant argues that our rule for the exclusion of witnesses should apply only to " ordinary witnesses," preventing them from "tailoring their testimony to match that of others." Expert witnesses, Appellant contends, should be allowed, or even encouraged, to hear and comment upon the testimony of other witnesses, especially the opposing experts. **We disagree**.

448 S.W. 3d at 789 (emphasis added).

At the Circuit Court level, Appellant counsel argued that the rule was that separation of witnesses only applies to lay witnesses. App. B at 1. The Court of Appeals believed that none of the experts would influence each other and it would be "helpful and expedient" for experts to observe each other's testimony first-hand. App. A at 4-5. Appellee bitterly protest in his brief that the "spirit" of KRE 615 is not violated by failing to sequester experts, that there is no allegation that the experts were "taught," and that the "long accepted reasons for sequestration are simply not applicable to expert witnesses with no personal knowledge of the facts." Appellee's Brief at 8.

Those arguments outlined above, made by Appellee and the Court of Appeals, are what are truly at the heart of this case and in Spears. This Court those exact arguments in Spears and found them wanting. This Court should likewise find those arguments wanting in this case.

D. Federal Cases And State Cases Coming to Contrary Conclusions to This Court Are Not Binding.

Appellee cites several Federal and state cases supporting his interpretation of KRE 615(3). Appellant will not address those cases point by point; Appellant has no need to. While Appellant cited to Morvant v. Construction Aggregates Corp., 570 F. 2d 626 (6th Cir. 1978), Opus 3 Ltd. v Heritage Park, Inc., 91 F. 3d 625 (4th Cir. 1996), and United States v. Olofson, 563 F. 3d 652 (7th Cir. 2009), Appellant did so to simply to demonstrate that the Court of Appeals incorrectly applied the thrust of the two Federal cases it chose to cite and to demonstrate case law more on point that the Court of Appeals ignored.

Appellee appears to want to reargue this Court's holding in Spears using Federal case law and cases from other states. While Federal cases and other state cases are at best persuasive and this Court is free to follow them or not. Presnell Const. Managers, Inc. v. Eh Const., LLC, 134 S.W. 3d 575, 581 (Ky. 2004). This Court is the final interpreter of Kentucky law. Appellant finds it significant that this Court decided Spears without reference to any other state or Federal cases whatsoever. Rather, this Court looked at what KRE 615(3) itself provided and determined that the Rule says what it says.

II. APPELLEE'S SHOWING WAS NO SHOWING AT ALL

To be exempt from sequestration under KRE 615(3), the party requesting the exemption must make a "showing that the witness is essential to the party's cause." Hatfield v. Commonwealth, 250 S.W. 3d 590, 594 (Ky. 2008). Allowing a witness to remain in the courtroom absent that showing is, in itself, error. *Id.* at 595; Spears, 448 S.W. 3d at 789.

Appellee continues to insist that his explanation that the experts would not be testifying to facts and his bare assertion that the expert witnesses were essential to the management of his case satisfy the showing requirement. Appellant addressed at length why Appellee's purported "showing" was insufficient in her prior brief and will not rehash those arguments now.

Appellee puts forth two new arguments regarding his "showing." First, Appellee states that Appellant never argued how she would be prejudiced by the trial court's ruling. Appellee Brief at 9. Appellee misses the point. Appellant merely needs to request that witnesses be sequestered; KRE 615 does not require Appellant give a reason for the request. It is Appellee's burden to show why it is essential that expert should be exempt from sequestration. Appellee need make any response at all. If Appellee's fails to make a showing of essentiality, then Appellee's experts should be sequestered.

Appellee also suggests, after the fact, that his experts were able to make contributions to his case by observing the testimony of other witnesses from the gallery. In support of this argument, he cites KRE 703(a) which allows a witness to base his or her opinion on data made known at trial. Appellee's Brief at 19. Appellee again misses the point. If Appellee intended this to be an argument in favor of exemption of sequestration, it should be made at the time the request for the exemption is made; after the face, the damage is done.

If there is an underlying theme throughout Appellee's brief, it is "Given that the experts are not testifying to the facts of the case, what reason is could there be for the experts to be excluded?" Appellant submits that this presumes the wrong question. The right question is, since 615(3) allows exemption for witnesses who are "essential", what essential reason exists for the experts to remain?

When the question is phrased correctly, Appellee's brief ironically undercuts his position. Appellee admits that most of the facts in the case were already known to the experts. Appellee's Brief at 20. Appellee admits that his experts were not "elbow experts" to help him with cross examination. Appellee's Brief at 19. Appellee did not argue to the trial court when requesting the exemption that his experts would be basing their opinions on testimony offered by other

witnesses at trial. Given all of this, Appellee can point to no reason why it was essential for his experts to remain in the courtroom.

III. ALLOWING APPELLEE'S EXPERTS TO ENGAGE IN INDRIECT DEBATE WITH APPELLEANT'S EXPERTS PREJUDICED APPELLANT BY INVADING THE PROVINCE OF THE JURY

This Court made clear in Spears that the correct way a trial should be conducted is "the time-honored tradition of each expert setting forth his or her opinion, subject to cross-examination by opposing counsel, and letting the jury determine the more credible view." 448 S.W. 3d at 789. This court rejected the idea that experts should indirectly debate each other during their testimony. *Id.* Rather than follow the time-honored tradition that this Court says is proper, the Circuit Court facilitated an indirect debate allowing Appellee's experts to remain in the courtroom.

A. Witnesses Should Not Comment on the Testimony of Other Witnesses

Appellee insists that there was no indirect debate, only that his expert "was simply asked if he agreed with certain testimony of Dr. Kodner and indicated that he did not agree," and that "when Dr. Shuttleworth was asked if Dr. Kodner was mistaken about the surgery at Vanderbilt, he indicated that what Dr. Kodner said in the courtroom and what he (Shuttleworth) read in the reports from Vanderbilt was not the same." Appellee's Brief at 17. Here one witness was asked to comment directly on the testimony provided by another witness; it is baffling how Appellee can try to claim that this cannot be characterized as indirect debate.

Furthermore, Appellee states that "disagreement among experts is routine." Appellee's Brief at 17. Appellant agrees; this is the reason for trials. However, Appellee further protests that "elicitation of how expert opinions differ is not precluded by any evidentiary rule or law." *Id.*

This assertion by Appellee is incorrect; there have always on the way those disagreements can be expressed through witnesses.

Appellant offers the following hypothetical to illustrate her point. Imagine a case of a simple car accident and the allegation is that the defendant ran a red light and collided with the plaintiff. William and Wanda both observed the accident. William will testify that the light was red; Wanda will testify that the light was green. It is perfectly appropriate for each side to call its witness to testify as to the color of the light. It is perfectly appropriate for each side to cross-examine the opponent's witness to challenge his or her perceptions. It is **not** appropriate for William to be asked if Wanda is lying if she claims the light was green. Moss v. Commonwealth, 949 S.W. 2d 579, 583 (Ky. 1997) ("With few exceptions, it is improper for a witness to comment on the credibility of another witness. A witness's opinion about the truth of the testimony of another witness is not permitted.")

While Dr. Shuttleworth was not asked if he thought Dr. Kodner was lying, asking Dr. Shuttleworth to comment directly on the testimony of Dr. Shuttleworth is similar to asking William if Wanda is lying and is the conduct that this Court found would be improper in Spears. Appellee is free to present the opinions of his experts during direct examination. He is free to attack the methods of Appellant's experts during cross-examination. Appellee is free to comment during closing arguments about whose opinion is correct and why. What he is forbidden to do is ask his witness to comment on the testimony of another witness, which is precisely what happened in the Circuit Court.

Which expert to believe is the decision of the jury and the jury alone. Ellison v. R & B Contracting, Inc., 32 S.W. 3d 66, 76 (Ky. 2000). By wrongly allowing Appellee's experts to remain in the courtroom, the Circuit Court set up a situation where Appellee was able to

improperly ask Dr. Shuttleworth to comment on Dr. Kodner's testimony. This is significant as this case was not a unanimous decision, but instead a 9-3 verdict and the jury could very well have been influenced by this improper questioning.

B. When Separation of the Witnesses is Invoked, Continuous Objections to Wrongfully Admitted Witnesses Are Not Necessary

Appellee claims that Appellant "took advantage" of the Circuit Court's ruling by bringing Dr. Kodner into the courtroom. Appellee's Brief at 23. While Appellant did bring Dr. Kodner into courtroom after the Circuit Court's ruling, this did not serve as a waiver of her invoking of KRE 615. The Circuit Court's incorrect opinion placed Appellant in an awkward position of Appellee claiming an advantage himself should she not ask her expert to come into the courtroom. Rather than "take advantage" of the incorrect ruling, Appellant merely tried to mitigate any possible disadvantage she might have if her expert was not present. To not do as Appellant did would be foolhardy at best.

Appellee incorrectly claims that Appellant has since waived all of her arguments by not objecting to Dr. Shuttleworth's testimony or move to exclude him as an expert. Appellee's brief at 22. Rather, Appellant made her objection to Dr. Shuttleworth's presence when she requested sequestration of the witnesses. Under KRE 615, "At the request of a party the court *shall order* witnesses excluded." (emphasis added). Once the request is made, the clear language of the rule makes such exclusion mandatory unless one of the three exceptions applies. Appellant clearly objected to the presence of Appellee's experts when she asked for an "across the board exclusion of witnesses." App. B at 1. To further make continuous objections during the testimony of Appellee's experts would serve no other function than to annoy the Circuit Court.

Appellee also tries to argue that the Circuit Court never had the opportunity to rule as to the improper comments regarding Dr. Kodner's testimony made by Dr. Shuttleworth. However,

the Circuit Court clearly stated that it would allow this type of testimony when it considered Appellee's request to exempt his witnesses from sequestration. The Circuit Court claimed "it would be helpful to the fact finder *for [the experts] to comment on the testimony of the expert witnesses from the other side.*" (emphasis added). App. B at 2-3.The Circuit Court made clear that it considered an indirect debate not only allowable, but desirable. The Circuit Court again made its position clear that it would allow experts to remain in the courtroom, the Circuit Court made clear it would sanction the indirect debate, and Appellant has every right to challenge what this Court said in Spears would truly be error.

CONCLUSION

For the foregoing reasons, as well as those contained in her original brief, Appellant Kathy McAbee respectfully requests this Court to enter an Order reversing the Opinion of the Kentucky Court of Appeals and reversing the Judgment of the Circuit Court, and remand this case for a new trial.

Respectfully submitted,

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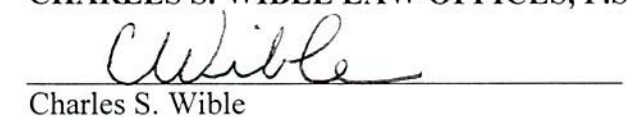
By: 

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